IN THE

Supreme Court of the United States.

OCTOBER TERM, 1888.

No. 506.

MARY WALL, APPELLANT,

vs.

THE DISTRICT OF COLUMBIA, APPELLEE.

Comes now the District of Columbia, by Henry E. Davis, its solicitor, appearing solely for the purposes of this motion, and moves the Court to dismiss the appeal in the above-entitled cause—

Because, as appears by the transcript of record in the said cause (an abstract wherefrom is hereto annexed, and which was filed in the Clerk's office of this Court on the twentieth day of October, 1886), the decree which was rendered in the said cause in the supreme court of the District of Columbia on the 26th day of November, 1883, and from which the supposed appeal was taken, is not a final decree; but if the said decree be deemed final no sufficient appeal therefrom was taken, for the only subsequent proceedings were that on the 5th day of November, 1885, there was filed in said court in the said cause a certain paper writing, as follows:

"Notice is hereby given of the plaintiff's intention to appeal this case to the Supreme Court of the United States, being an appeal from the decision of the general term of the

above District court entered on the 26th day of November, 1883.

"(Signed) J. W. DOUGLASS,
Solicitor for Plaintiff."

And an appeal bond, in the usual form, approved by D. K. Cartter, chief justice, on the 17th day of November, 1885, was on said day filed in said court; but no notice of said supposed appeal was given to the District of Columbia, nor was any citation thereon ever issued.

HENRY E. DAVIS,
For the Motion.

Abstract from Transcript of Record.

In the Supreme Court of the District of Columbia, holding a General Term.

* * * * * *

MONDAY, *Nov.* 26, 1883.

Session resumed pursuant to adjournment.

Present: Chief Justice Cartter and Justices Cox and James.

MARY WALL
vs.
THE DISTRICT OF COLUMBIA *et al.* } Equity. No. 8307.

This cause having been ordered by the equity court to be heard in the first instance upon the defendant's demurrer to the original and amended bill, and being argued by George L. Douglass, for complainant, and Francis Miller, for the District of Columbia, it is thereupon ordered, adjudged, and decreed that the said demurrer be, and it is hereby, sustained, with leave to the complainant to amend as she may be advised.

(Signed) D. K. CARTTER,
Chief Justice.

In the Supreme Court of the District of Columbia.

(Filed Nov. 5, 1885.)

MARY WALL
vs.
THE DISTRICT OF COLUMBIA. } In Equity. No. 8307.

Notice is hereby given of the plaintiff's intention to appeal this case to the Supreme Court of the United States, being an appeal from the decision of the general term of the above District court, entered on the 26th day of November, 1883.

J. W. DOUGLASS,
Sol. for Plaintiff.

November 4, 1885.

Appeal bond in usual form, approved by D. K. Cartter, chief justice, November 17, 1885.

Transcript filed October 20, 1886.
(MSS. Record, pages 27–30.)

Service of the foregoing motion and notice that the same will be submitted for consideration by the Court on Monday, December 17th, 1888, is acknowledged this 26 day of November, A. D. 1888.

J. W. Douglass

Counsel for Appellant.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1888.

MARY WALL, *Appellant*,
vs.
THE DISTRICT OF COLUMBIA *et al.*, *Appellees.* } No. 506.

The appellant by J. W. Douglass, her solicitor, comes and replies to the motion to dismiss in this case, as follows:

CITATION.

I.

It appears by the affidavits filed herewith, and the stipulation contained in the transcript of record, that the appellees solicitor had *actual notice* on the 28th of September, 1886, that the case was to be appealed to this court, and that the transcript would be filed during the following month of October, 1886. The transcript was filed in this court on the 20th of October, 1886. This gave the appellees solicitor twenty-two days notice, *before* the transcript was filed.

Notice of an appeal to this court from the decree of November 26th, 1883, of the court below, was entered of record below on the 4th of November, 1885, and the appeal bond approved by the Chief Justice below, on the 17th of November, 1885. (*See affidavits filed herewith, and copy of stipulation; and appellees motion, pages* 2 *and* 3).

II.

The affidavits herewith also show, that twice, subsequent to the filing of the transcript of record in this court, the appellees having advertised for sale, the same pieces of property embraced in the bills filed in the case, on account of the same arrears of taxes, or parts of them, which the appellant claimed had been paid, and had asked an injunction to restrain the sale on account of, the solicitor for the appellant called upon the solicitor for the appellees, and requested that the said sales should not be attempted, because the case upon these very taxes and pieces of property was depending in this court. That any attempt to sell under the circumstances, would be disrespectful and out of order. In each instance the solicitor for the appellees had the sales postponed indefinitely, upon notice and request. (*See affidavits herewith*).

III.

The facts as referred to in the above paragraphs, it is earnestly contended, disclose just such a case as this court has always held to render a citation unnecessary.

"The object of a citation on appeal being *notice*, no citation was necessary in a case where, in point of fact, by agreement of parties, actual and full knowledge of the party appellee of the other sides intentions to appeal appeared of record."

1. Wall., 690.

"An appeal, although allowed out of term, is not avoided by the non-service of a citation; but this court will impose such terms, * * * as may be legal and proper."

4. Otto., 112.

"When * * the parties have had notice, in fact, that an appeal has been taken, * * the citation is held to be unnecessary." Phillips Prac., 131.

The stipulation of September 28th, 1886, shows just such an "agreement," and "knowledge" of the "intention to appeal," as the above quotation from the case in 1 *Wall.*, contemplates. If citation is simply notice, then the appellees in this case have all the notice that any party could demand or require.

If however, notwithstanding the above consideration, the court should think a more formal notice, or citation is required, then the appellant asks that a citation be issued out of this court, to be served upon the solicitor of the appellees, upon terms as contemplated by this case, in 4 *Otto.* 112, if any terms are considered necessary. This appeal has been here now *two years*, and *actual knowledge* of it had by the appellees and their solicitor for all that time, but no motion until now. No harm can be done, but great hardship in time and expense to the appellant can be avoided by the method just suggested.

IV.

The Decree.

The appellees further move the dismissal of the appeal, because the decree "is not final."

The bill filed below set out in full, the complainants entire case. The demurrer was general to the entire bill, and the decree of November 26, 1883, "sustained the demurrer." (*See page* 2, *appellees motion.*) That was the end of our bill of course. The court below, however, added the gratuitous language "with leave to amend." There was no motion to amend pending, no talk of amending during the argument in the General Term, no necessity for an amendment, as the

bill and demurrer show, and any attempt to amend by the complainant, would have resulted in, but *repetition*, *surplussage* or *fiction*. The last line of the decree was surplussage enough it would seem for one case.

In the case of *French vs. Shoemaker*, 12 *Wall.*, 98, this court held that,—

"In general where a decree passed, determines the whole law applicable to the case, and in terms or by necessary implication, disposes of every claim presented, it will be deemed a final decree," etc.

And this court further said in that case, that a "leave superadded as a precaution," would not alter the *final* character of the decree.

IN THE
SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1888.

MARY WALL, *Appellant*,
vs.
THE DISTRICT OF COLUMBIA. } No. 506.

DISTRICT OF COLUMBIA,
City of Washington. } *ss:*

Personally appeared, Mary Wall, of the city aforesaid, who being duly sworn, deposes and says; that she is the appellant named in the above stated case; and that the appellees, by their proper officers, on the 7th day of September 1886, after the final decree in

the Court below in General Term, in the case (No. 8307 in Equity,) from which this appeal was taken, advertised for public sale, on account of the same taxes and charges, on the 28th of Sept. 1886, the same lots covered by the final decree above referred, notwithstanding her counsel had given notice on the record of the said court below that an appeal to this court would be taken, that her counsel called upon the Commissioners of the District and the attorneys for the District, at her request, and informed them that the case had been appealed to this court, and that the transcript of the record would be filed in this court during the next month, (October, 1886,) which was done. That upon this representation, the said proposed sale was stopped and the lots withdrawn.

That the said lots were again advertised for sale, on the 27th day of September, 1887, by the defendant, for the same taxes and charges involved in the said equity proceeding, No. 8307, and embraced within the appeal of this case to this court; that again at her request, her said counsel called upon Mr. Henry E. Davis, attorney for the defendants, and stated to him, that the case involving the said lots advertised, and for the same taxes and charges had been appealed to this court, and requesting therefore that the lots advertised should be withdrawn from sale and again the lots were not offered for sale.

That the said lots were again advertised for sale by the defendants, on the 23d of Feburary, 1888, on account of certain tax certificates in the hands of the First National Bank of New York, representing certain of the taxes against the lots aforesaid, and that her counsel aforesaid again requested prior to the date of proposed sale, that the said sale be not made, because of the appeal of the said equity proceeding, No. 8307, in the court below, and the sale was not attempted.

That on the 28th of September, 1886, her counsel aforesaid, presented to Mr. Davis, the attorney of the defendants, a certain stipulation in the case, requesting him to sign the same for the purpose of completing the record in the said case, No. 8307, that the same might be filed in the Supreme Court of the United States, during the following month of October, 1886, that the said stipulation was signed by the said Davis as attorney for the defendants, for the said purpose, and is now part of the transcript of the record, filed in this court in this case, and which transcript was filed in this court on the 20th of October, 1886.

All of which is just and true to the best of her knowledge and belief.

MARY WALL.

Sworn to and subscribed before me this 4th day of January, 1889.

D. RITTENHOUSE,
Notary Public.

[SEAL]

DISTRICT OF COLUMBIA,
City of Washington. } *ss:*

Personally appeared J. W. Douglass, who being duly sworn, deposes and says, that he has read the affidavit in this case made by the appellant, Mary Wall, and that he is the person therein named, and that the facts as stated in the said affidavit are true to the best of his knowledge and belief.

J. W. DOUGLASS.

Sworn and subscribed to before me this 4th day of January, 1889.

D. RITTENHOUSE,
Notary Public.

[SEAL]

Respectfully Submitted,

J. W. DOUGLASS,
Solicitor for Appellant.

* Should be "counsel".

[*Abstract from manuscript Record.*]

SUPREME COURT OF THE DISTRICT OF COLUMBIA.

MARY WALL,
vs.
THE DISTRICT OF COLUMBIA, ETC. } In Equity No. 8307.

STIPULATION.

It is hereby agreed and stipulated that the deed of December 15th, 1880, (filed in this case,) made by the defendants, (District of Columbia,) for subdivision in *No.* 1, *in square No.* 38, may be taken and considered in evidence for all purposes in the above entitled case,

* * * * * * * *

J. W. DOUGLASS,
Counsel for Complainant.
HENRY E. DAVIS,
Counsel for Defendants.

September 28th, 1886.

[See pages 10 and 11, Mss. Record.]

131-1150
(1)

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1888.

THE FIRST NATIONAL BANK OF TOLEDO, Appellee, *vs.* FOSTER R. WARREN, Substituted for Joel W. Kelsey, Treasurer, Appellant.	No. 356.
THE SECOND NATIONAL BANK OF TOLEDO *vs.* THE SAME.	No. 357.
THE MERCHANTS' NATIONAL BANK OF TOLEDO *vs.* THE SAME.	No. 359.
THE NORTHERN NATIONAL BANK OF TOLEDO *vs.* THE SAME.	No. 360.
THE TOLEDO NATIONAL BANK OF TOLEDO *vs.* THE SAME.	No. 358.

The appellants will take notice that the appellees in the above-entitled cases will present to the Court the motions heretofore filed therein to dismiss the appeals, and that said motions will be argued and presented on Monday, November 19, 1888, on briefs.

JOHN H. DOYLE,
Appellee's Solicitor.

Toledo, Oct. 31, 1888.

The appellants hereby acknowledge service of the above notice, and consent that said motions may be submitted without argument or briefs by appellants.

ISAAC P. PUGSLEY,
Appellant's Solicitor.

Toledo, Oct. 31, 1888.

[Endorsement:] Sup. Court U. S. 1888, Oct'r Term. Nos. 356, 357, 358, 359, and 360. Foster R. Warren, Treas', &c., App'l, *vs.* The First National Bank of Toledo *et al.* Same *vs.* 2nd Nat. B'k. Same *vs.* Toledo Nat'l B'k. Same *vs.* Merch'ts' Nat. B'k. Same *vs.* North'n Nat. B'k. Notice and proof of service with consent to submission of motions.

[Stamped:] Office Supreme Court U. S. Filed Nov. 8, 1888. James H. McKenney, clerk.

SUPREME COURT OF THE UNITED STATES.

October Term, 1888.

No. 356.

FOSTER R. WARREN, SUBSTITUTED FOR JOEL W. KELSEY, TREASURER OF LUCAS COUNTY, OHIO, Appellant,

vs

THE FIRST NATIONAL BANK OF TOLEDO, OHIO.

Extracts from the Transcript of the Record.

* * * * * * *

(Page 17.)

And afterwards, to wit, on the 7th day of January, A. D. 1884, the following order for an injunction was filed in this cause in said court, viz:

Order for Injunction.

FIRST NATIONAL BANK OF TOLEDO, OHIO, Complainant,

vs.

JOEL W. KELSEY, Treasurer, &c., Defendant.

This day came the complainant, by John H. Doyle, its solicitor, and submitted to the court the bill herein filed and the affidavit and exhibits in support thereof, and it being shown that due notice had been given to the defendant of complainant's intention to apply at this time for a provisional injunction, and the court having examined the said bill and affidavit and exhibits, and being fully advised in the premises, do hereby grant and allow a preliminary injunction restraining the defendant until the final hearing hereof (from collecting or enforcing against the complainant the sum of eighteen hundred and twenty-six $\frac{53}{100}$ dollars, or any part thereof, being the taxes charged on the duplicate against the complainant on the sum of seventy-four thousand eight hundred and fifty-eight dollars), which last-named amount was added to the valuation of complainant's shares by the State board for the equalization of bank shares of the State of Ohio, upon complainant's giving bond in the sum of twenty-five hundred dollars, with sureties to be approved by the clerk of this court, conditioned to abide and perform such order as the court may make in the premises. And thereupon came also the complainant, by his solicitor, and the defendant, by his solicitor, and, upon consideration and by consent, it is further ordered that the treasurer may, and is hereby, authorized to receive from the complainant the balance of the taxes charged upon the duplicate against the complainant in the semi-annual installments provided by law without prejudice to his right to collect the said sum of $1,826.53 or any part thereof if, upon final hearing, it shall be adjudged that the same or any part thereof is legally and equitably chargeable against

complainant; and the said complainant is authorized to pay the same, except the said $1,826.53, without prejudice to its right to recover back from the treasurer *is* any action duly instituted for that purpose any portion of the same so paid which may, upon final hearing hereof, be adjudged to be illegally assessed or charged against it, and if the December installment of said other taxes are paid within ten days from this date (January 7, 1884) the same shall be without penalty.

* * * * * * *

(Page 129.)

And afterwards, to wit, on the 12th day of December, being a day of the December term, A. D. 1885, of said court—present, the Honorable Martin Walker, district judge, and the Honorable E. S. Hammond, judge of the United States for the western district of Tennessee, sitting by designation of the circuit judge in the circuit court of the United States for the northern district of Ohio—the following decree was entered in this cause in said court, viz:

Decree.

THE FIRST NATIONAL BANK OF TOLEDO

vs.

JOEL W. KELSEY, Treasurer, Revived in the Name of Foster R. Warren, Treasurer of Lucas Co., Ohio.

This suit came on to be heard upon the bill of complaint, the answer, and the replication and the proofs, and was argued by counsel; and the court having carefully examined the pleadings, exhibits, and proofs, and, being now fully advised in the premises, do find the equities of the case with the complainant, and that the allegations of its said bill of complaint are true. It is therefore ordered, adjudged,

and decreed that the defendant be, and he is hereby, perpetually enjoined from collecting any taxes upon the increased valuation made by the State board of equalization of the bank shares of complainant for the year 1883, and from collecting, enforcing, or attempting to collect or enforce, any tax or charge based or levied upon the increased valuation made by the State board of equalization aforesaid; and it being made to appear to the court that the complainant had paid all taxes charged upon the duplicate against the shares in said bank as assessed by the county auditor for taxation, and upon the valuation made by said auditor, and that the only taxes charged against the complainant upon the bank shares aforesaid on the tax duplicate for the year 1883, which remains unpaid, are the amount which was assessed upon the increase made by the State board of equalization, which the court finds to be illegal. It is therefore ordered that the injunction aforesaid granted be held to restrain the defendant from collecting or attempting to collect any part of the said unpaid taxes, or any penalty or interest because of this non-payment.

And it is further ordered, adjudged, and decreed that the complainant recover of the defendant the costs herein expended, taxed at ——, and that if the same be not paid within five days that execution issue therefor.

The defendant thereupon came in open court and prayed an appeal of this cause to the next term of the United States Supreme Court. The bond for such appeal is hereby fixed at $500; and said appeal is hereby allowed.

* * * * * * *

NOTE.—The order for injunction and the decree in the other four cases are in exactly the same language, except as to the amounts in controversy, which amounts are stated on page 7 of the brief.

Numbers.....

United States Supreme Court.

THE FIRST NATIONAL BANK OF TOLEDO,

vs.

FOSTER R. WARREN, *substituted for*
JOEL W. KELSEY, *Treasurer of Lucas County, Ohio.*

THE SECOND NATIONAL BANK of Toledo,

vs. SAME.

THE MERCHANTS NATIONAL BANK of Toledo.

vs. SAME.

THE TOLEDO NATIONAL BANK, of Toledo.

vs. SAME.

THE NORTHERN NATIONAL BANK of Toledo.

vs. SAME.

BRIEF ON MOTION TO DISMISS APPEALS.

JOHN H. DOYLE,
Solicitor of Appellee.

DOYLE & SCOTT.

Spear, Johnson & Co., Printers, Toledo.

United States Supreme Court.

THE FIRST NATIONAL BANK OF TOLEDO,

vs.

FOSTER R. WARREN, substituted for JOEL W. KELSEY, Treasurer of Lucas County, Ohio.

And with this is also submitted the cases of the Second National Bank, Toledo National Bank, Merchants National Bank and Northern National Bank of Toledo, against the same defendant.

BRIEF ON MOTION TO DISMISS APPEAL.

In these cases decrees were taken in the Circuit Court for the Northern district, Western division, of Ohio, restraining the defendant from enforcing a tax which the court found was, as to the amount involved in the decrees, illegally assessed against the Banks.

The issues in the five cases are identical, and the testimony in the case entitled above was used in the trial of each of the others.

In each of the cases we have filed a motion to dismiss the appeal, because the matter in dispute does not exceed the sum or value of five thousand dollars.

The decree in each case is

"That the defendant be and he is hereby perpetually enjoined from collecting any taxes upon the increased valuation made by the State Board of Equalization aforesaid, and it being made to appear to the court that the complainant has paid all taxes charged upon the duplicate, against the shares in said Bank as assessed by the county Auditor for taxation, and upon the valuation made by said Auditor, and that the only taxes charged against the complainant upon the bank shares aforesaid, on the tax duplicate for the year 1883, which remains unpaid is the amount which was assessed upon the increase made by the State Board of Equalization, which the court finds to be illegal.

It is therefore ordered, that the injunction aforesaid granted, be held to restrain the defndant from collecting, or attempting to collect. any part of the said unpaid taxes, or any penalty or interest because of their non-payment." It appears therefore from the decree, that all taxes upon the valuation of the bank shares made by the Auditor, were paid by the plaintiff, and hence the only matter in dispute was the tax upon the increase, over the auditor's valuation, made by the State Board of Equalization.

The allegation of the bill is :

"Complainant says that the auditor of Lucas county aforesaid certified to the auditor of state and the said Board for the Equalization of bank shares the assessment so by him placed upon the shares of complainant's bank, and thereupon the said State Board of Equalization of bank shares, * * * * * * added to the valuation

made by the auditor aforesaid of the shares of the complainant bank the sum of *Seventy-four thousand eight hundred and fifty eight* dollars, making the aggregate value for taxation the sum of $476,482."

The assessment by the auditor was $401,624. The total amount of taxes for all purposes on the $74,858, which was added by the state board was $1,826.53 which is all that there is involved in the suit or in controversy between the parties.

The allegations of the bill show that a tender was made to the treasurer before the commencement of the suit, and a copy of the treasurer's acknowledgement of such tender copied into the bill shows the amount in dispute very clearly. It is as follows:

"The First National Bank of Toledo has tendered to me all taxes charged against it and on its bank shares except $1,826.53, being the tax on $74,858 the increase made over to the auditor's valuation by the state board of Equalization for bank shares, which tender was refused. The bank offers to pay the same leaving the said $1,826.53 to be litigated. Refused.

JOEL W. KELSEY, Treasurer.

The prayer of the bill is:

"That a provisional injunction may be granted restraining and enjoining said defendant from proceeding to collect the taxes so unlawfully assessed as aforesaid, or any part thereof, until the further order of this court, and that upon the final hearing of this cause the said in-

"The expression, sum or value of the matter in dispute, has reference to the date of the decree in the circuit court."

Bank vs. Daniel, 12 Pet. 32.

Terry vs. Hatch, 93 U. S 44.

But it needs no other authority than the language of the statute itself to show that the appeal in these cases was unauthorized and this court without jurisdiction.

"SEC. 692. An appeal shall be allowed to the supreme court from all final decrees of any circuit court, in cases of equity, and of admiralty and maritime jurisdiction, where the matter in dispute, exclusive of costs, exceeds the sum or value of five thousand dollars, and the supreme court is required to receive, hear and determine such appeals.

This is an appeal by the defendant against whom the deree is only $1,826.53. The plaintiff does not appeal. It is not material, therefore, what claim it made in its bill. Even if it had insisted upon the exemption of its government bonds upon the trial, as that decree did not give it any relief upon that claim. But, in fact, it did not insist upon that claim.

The rule as established by this court in Hilton vs. Dickinson, 108 U. S. 165, is decisive of that question.

"This court has jurisdictian of a writ of error or appeal by the plaintiff below—if he failed to recover or recovered in part only—when the amount sued for, and which he failed to recover, equals or exceeds its jurisdictional limit; *and by a defendant below, when the recovery*

against him equals or exceeds that limit, or his set-offs or counter-claims equal to or exceeding that limit, are defeated."

In the latter case a review of the former decisions by this court is had and the question involved in the cases at bar fully disposed of.

There is no set off or counter-claim pleaded by defendant; no other prayer or claim than that the bills be dismissed.

We discuss no other question, and have taken the facts in the case of The First National Bank because it involves the largest amount, the other cases involving precisely the same principles, the allegations and proof being in all of them identical, except as to the amount, which is as follows in the cases respectively:

SECOND NATIONAL BANK,	-	-	$772.69
MERCHANTS "	"	-	773.45
TOLEDO "	"	-	293.02
NORTHERN "	"	-	230.45

We therefore ask that the appeals in these cases be dismissed because they are not within the jurisdiction of this court.

JOHN H. DOYLE,

Solicitor for Appellees.